

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2013AP309-CR

Cir. Ct. No. 2011CF1403

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARIO EMMANUEL JAMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Mario Emmanuel James, *pro se*, appeals the judgment convicting him of armed robbery with the use of force, as party to a

crime, contrary to WIS. STAT. § 943.32(2) & 939.05 (2011-12).¹ He also appeals the order denying his postconviction motion without a hearing. James argues that the trial court erred in denying his motion without a hearing because: (1) the prosecutor engaged in misconduct by knowingly putting on false testimony and vouching for a witness's credibility; (2) the photo array in which one of the robbery victims identified him was impermissibly suggestive; (3) trial counsel was ineffective; and (4) reversal is required in the interest of justice. We disagree and affirm.

BACKGROUND

A. Nature of the Case

¶2 James was charged with armed robbery as party to a crime in March 2011. According to the criminal complaint, victim John Correa (hereafter “Correa”) was at home in his apartment with his girlfriend, Destiny Bump, and his brother, Pedro Correa (hereafter “Pedro”), when someone knocked on the door. Bump got up to answer the door and asked who was there. A male voice responded, “Darryl,” the name of a mutual friend. When Bump opened the door, however, Darryl wasn’t there; instead, an unknown man grabbed her hair and held a semi-automatic gun to her head. Two additional unknown men came into the apartment behind him, demanding that Correa get onto the floor and Pedro put his hands up. One of the men—later identified as James—asked Correa, “where’s the shit?” When Correa replied that he did not have anything, James warned, “if you’re lying and I find something, I’m going to shoot your brother.” Correa then

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

directed James to an “Axe” shaving kit, which contained a revolver and some marijuana, on the floor in the living room. James retrieved the bag. He and the other robbers also took a DVD player, a Nintendo Wii, a purse containing various identification cards, \$350, and a mobile phone, among other items. Several weeks later, police found James hiding in a kitchen cabinet at his girlfriend’s apartment. They also found the stolen identification cards, the “Axe” kit, and the mobile phone there. According to police, James’s girlfriend, Natasha Roche, had given permission to search the apartment.

B. Motion to Suppress

¶3 James pled not guilty to the armed robbery charge and filed a motion to suppress evidence found in Roche’s apartment on the grounds that Roche had not freely given consent to search the apartment. According to Roche’s affidavit accompanying the motion, she did not give police permission to search her apartment; rather, police officers had “bum rushed” her and had later forged her signature on a consent form. Roche’s affidavit alleged that she had refused to sign the form giving consent to search the apartment and that the signature on the consent form was not hers.

¶4 On the day the motion was supposed to be heard, Roche did not testify. She initially appeared to testify, but then abruptly left before she was called. The hearing was consequently rescheduled for a later date. At the next hearing date, which was also the first day of trial, trial counsel informed the court that Roche’s phone number had been disconnected and that she did not have new personal service on her. Trial counsel explained that she would be withdrawing the motion, as James had agreed that he was ready to proceed with trial.

C. Trial Testimony

¶5 At trial, Correa gave a version of the robbery consistent with the facts in the complaint, and explained how he was able to identify James as one of the robbers. Correa testified that, while the bottom half of James's face was covered with a ski mask, he could see James's face "from the cheekbone up" and "recognized [James's] face and voice." Correa further explained that he had known James for a couple of months before the robbery occurred and that James had previously visited Correa's apartment.

¶6 Bump and Pedro also testified. Bump testified that she could not identify any of the robbers because she was forced to the floor right away. Pedro also testified that he could not identify any of the robbers, but did remember that one of the robbers had a scarf on his face. Pedro further testified that, after the robbery, the police brought Pedro a picture of a scarf, which he recognized as the scarf worn by one of the robbers.

¶7 Additionally, several police officers testified. Officer Frank Vrtochnick testified that subsequent to the robbery, on March 2, 2011, he and several other officers went to Roche's residence to look for James. Vrtochnick testified that Roche provided her consent to enter the residence. There, the officers found the following, all of which belonged to the victims: a .38-caliber revolver; several identification cards; a wallet; and medical cards. Officer Kevin Bolyard testified that he conducted a photo array with Correa in which Correa identified James as one of the robbers. Bolyard also testified that some time in March 2011 he went to Roche's residence with Detective Ramona Ruud and spoke with Roche. There, the officers recovered the Axe bag, a cell phone, and a scarf. Bolyard further testified that he never told Correa that his property was found in a

residence where James was located. Detective Ruud testified that the photo array shown to the victims was generated based upon Correa's description of the suspect and Ruud's "knowledge that identification had been recovered in the residence that Mario James was arrested in." Like Officer Bolyard, Detective Ruud testified that she never told Correa or Bump that their property was found in a residence where James was located.

¶8 James did not testify in his defense at trial. During closing argument, James's trial counsel said that James was "in the wrong place at the wrong time."

D. Conviction and Further Proceedings

¶9 The jury found James guilty. James subsequently filed a *pro se* motion for postconviction relief, which was denied. This appeal follows. Additional facts will be developed as necessary.

ANALYSIS

¶10 James presents four arguments on appeal: (1) the prosecutor engaged in misconduct by knowingly putting on false testimony and vouching for a witness's credibility; (2) the photo array was impermissibly suggestive; (3) trial counsel was ineffective; and (4) reversal is required in the interest of justice.²

² This court has thoroughly reviewed James's *pro se* brief to discern his arguments for each issue on appeal. To the extent we do not address an argument, we conclude it is not dispositive. See, e.g., *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

¶11 James forfeited the right to appeal the first two alleged errors, however, because he did not object to them at trial. *See State v. Marinez*, 2011 WI 12, ¶49, 331 Wis. 2d 568, 797 N.W.2d 399 (“A defendant who fails to object at the time of alleged errors by the prosecutor risks forfeiting review of such errors on appeal.”). We will therefore discuss the errors James alleges regarding prosecutorial misconduct and the propriety of the photo array in our analysis of whether trial counsel was ineffective. *See State v. Carprue*, 2004 WI 111, ¶¶47, 69, 274 Wis. 2d 656, 683 N.W.2d 31.

1. Trial counsel was not ineffective.

¶12 On appeal, James argues that the trial court erroneously denied his postconviction motion alleging ineffective assistance of counsel without a hearing. “Whether a defendant’s postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review.” *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. “A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief.” *Id.*, ¶14. This is a question of law subject to *de novo* review. *See id.*, ¶9. “If the motion raises such facts, the [trial] court must hold an evidentiary hearing.” *Id.* If, on the other hand, “the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing.” *Id.* We review the trial court’s discretionary decisions under an erroneous exercise of discretion standard, *see id.*, upholding the trial court’s decisions “unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion,” *see State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995).

¶13 To sufficiently allege that trial counsel was ineffective, James must set forth facts showing that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See State v. Mayo*, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115; *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, James must allege facts from which a court could conclude that trial counsel's representation was below objective standards of reasonableness. *See State v. Wesley*, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To demonstrate prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See Strickland*, 466 U.S. at 694. The issues of performance and prejudice present mixed questions of fact and law. *See State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *see id.*, but the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see id.* at 236-37.

¶14 James presents numerous allegations of trial counsel's ineffectiveness: (a) failure to object to alleged prosecutorial misconduct; (b) failure to object to an allegedly impermissibly suggestive photo array; (c) the decision to withdraw the motion to suppress; (d) failure to move to strike Correa's testimony; and (e) failure to sufficiently cross-examine Correa. He also argues that the combined effect of the alleged failures of counsel prejudiced him. We address each argument in turn.

(a) Counsel was not ineffective for failing to object to alleged prosecutorial misconduct.

¶15 James argues that trial counsel should have objected on two instances when the prosecutor engaged in misconduct. First, James points to Correa's trial testimony, in which Correa testified that he recognized James's "face and voice." He claims that because this testimony is different from James's preliminary-hearing testimony, the prosecutor knowingly put on "false" testimony and trial counsel should have objected to its admission. Second, James claims that the prosecutor improperly "vouched" for Correa's credibility at trial, and that trial counsel should have objected. We disagree.

¶16 Trial counsel was not ineffective for failing to make an objection with regard to the prosecutor's decision to elicit identification testimony from Correa. This is because Correa's trial testimony was not inconsistent with his preliminary hearing testimony.

¶17 Correa's preliminary hearing testimony was very brief. At the preliminary hearing, Correa testified that he recognized James as the robber who pointed a gun at him and told him to get on the floor. He then explained, on cross-examination, that he recognized James by his "build and voice." When defense counsel asked on cross-examination whether the robbers were wearing masks that concealed their faces, Correa testified that they were, and testified that he was unable to see James's face.

¶18 At trial, Correa did not directly contradict, but expanded upon, his preliminary-hearing testimony. He testified that he recognized James's "face and his voice," and explained that while the bottom half of James's face was covered, he could see James's face "from the cheekbone up." The second statement

elaborates on the first; the two statements are not necessarily inconsistent. Therefore, any objection that the prosecutor knowingly put on false testimony would have been overruled. Trial counsel was not deficient for deciding not to make a meritless objection. *See State v. Berggren*, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110. Consequently, trial counsel was not ineffective. *See Strickland*, 466 U.S. at 687, 697.

¶19 Likewise, trial counsel was not ineffective for failing to object to the prosecutor’s closing argument because it was not improper “vouching.” James points to the following statement from the prosecutor’s closing: “John Correa had no problem telling you that he was in possession of marijuana that day.” This statement was part of a more general summary of the evidence:

The defendant asks John Correa where the stuff is. When John Correa says that he doesn’t know, then [James] threatens to shoot Destiny Bump. He threatens to shoot her.³ John Correa then tells the defendant, Mario James, where the stuff is.

And what’s this stuff? He led them to this bag, this Axe bag. You will be able to see this back in the jury room if you ask for it. What’s in here? Some marijuana. *John Correa had no problem telling you that he was in possession of marijuana that day.* He directs the defendant to this bag. The defendant then continues riffling through the house, searching.

(Emphasis added.)

¶20 We are unconvinced that the prosecutor’s statement was improper. Taken in context, the comment was nothing more than the prosecutor’s summation

³ Although the complaint states that the robbers threatened to shoot Pedro, the prosecutor argued, consistent with Correa’s trial testimony, that they threatened to shoot his girlfriend.

of the case. “A prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors.” *State v. Adams*, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). Trial counsel was not deficient in failing to object to the prosecutor’s statement, and James does not sufficiently argue that he was prejudiced by it. See *Strickland*, 466 U.S. at 687, 694. Therefore, trial counsel was not ineffective.

(b) Counsel was not ineffective for failing to move to strike evidence of the photo array.

¶21 James next argues that trial counsel was ineffective for failing to move to strike evidence regarding the photo array that police showed the victims. According to James, the following trial testimony proves that the “officers informed the victims prior to the photo array that James possessed their property” and that the officers told them that police found their stolen possessions at James’s residence:

- Correa’s testimony on cross-examination that he thought James was one of the robbers because he recognized James and because police found his property at James’s house;
- Bump’s testimony that she recovered her stolen items when “[t]he officers that came to find out how [James] had our stuff gave them back to us”; and
- Pedro’s testimony that, several weeks after the robbery, a police officer stopped by with some photos for him to look at, as well as some stuff that the robbers had “supposedly” taken from his brother.

¶22 James’s argument is without merit. While the police may have found the stolen goods at his girlfriend’s apartment, and while the victims may have believed, by the time trial occurred, that police found their stolen items at James’s residence, James points to no testimony establishing that police told the victims where their belongings were found. In other words, James provides us with no evidence contradicting the trial court’s finding that “nobody in the trial testified that they had told the victims where their belongings were found.” *See State v. Hajicek*, 2001 WI 3, ¶15, 240 Wis. 2d 349, 620 N.W.2d 781 (findings of historical fact will not be upset unless they are clearly erroneous). Indeed, as the State correctly notes, Officer Bolyard and Detective Ruud testified that they did not inform the victims where the property was found.

¶23 Because there would have been no merit to a motion to strike any testimony regarding the photo array, trial counsel was not deficient for failing to file such a motion. *See Berggren*, 320 Wis. 2d 209, ¶21. Consequently, trial counsel was not ineffective. *See Strickland*, 466 U.S. at 687, 697.

(c) Counsel was not ineffective for withdrawing the motion to suppress.

¶24 James next argues that trial counsel was ineffective for withdrawing the motion to suppress evidence recovered from the search of Roche’s apartment. Specifically, James argues that trial counsel was ineffective for failing to subpoena Roche for the rescheduled hearing date. James does not, however, provide any basis for us to conclude that had trial counsel subpoenaed Roche, she would have testified consistently with her affidavit instead of the consent form, which does appear to be signed by Roche, and which is consistent with the officers’ testimony that Roche voluntarily consented to the search of her apartment. Therefore, James

cannot show prejudice and cannot show that trial counsel was ineffective. *See Strickland*, 466 U.S. at 694, 697.

(d) Counsel was not ineffective for failing to move to strike Correa's testimony.

¶25 James next argues that trial counsel was ineffective for failing to strike Correa's identification testimony. Again James argues that Correa's testimony was inconsistent and that counsel should have moved to strike it. As we explained earlier, Correa's testimony was not inconsistent. Moreover, James provides no legal basis for his argument that such a motion to strike would have been granted; thus he cannot show that counsel's performance was deficient. *See Berggren*, 320 Wis. 2d 209, ¶21. Consequently, trial counsel was not ineffective. *See Strickland*, 466 U.S. at 687, 697.

(e) Counsel's cross-examination of Correa did not constitute ineffective assistance of counsel.

¶26 James also argues that trial counsel's cross-examination of Correa was ineffective. He claims that trial counsel should have impeached Correa's testimony that he recognized a "birthmark" under James's eye because James has no such birthmark. James cannot prove prejudice, however, because James appeared in front of the jury at trial. The jury saw James and his birthmark (or lack thereof) for itself, and counsel was not ineffective for failing to draw attention to it. *See State v. Maloney*, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620 (counsel's strategic decisions are "virtually unassailable"). James also argues that trial counsel failed to present allegedly "inconsistent statements" that Correa made regarding his identification of James as one of the individuals who robbed him. This is little more than a rehash of his earlier arguments, however, and we

consequently will not consider it. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

(f) *The combined effect of James’s alleged errors does not entitle him to relief.*

¶27 James’s final argument regarding ineffective assistance of counsel is that the cumulative effect of the above-alleged errors prejudiced him at trial. James’s argument is little more than a brief summation of his earlier, unsuccessful arguments regarding trial counsel’s effectiveness. As our supreme court has explained, adding together numerous failed arguments does not create one successful one—“[z]ero plus zero equals zero.” *See, e.g., Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). As detailed more fully above, evidence of James’s guilt was strong in this case. Therefore, for all of the reasons discussed above, trial counsel’s performance was not ineffective, and James is not entitled to a hearing on his postconviction motion. *See Allen*, 274 Wis. 2d 568, ¶9.

2. A new trial is not in the interests of justice.

¶28 James additionally argues that several of the errors regarding trial counsel’s alleged ineffectiveness warrant a new trial in the interest of justice. *See WIS. STAT. § 752.35* (The court of appeals has the discretionary power to reverse a conviction in the interest of justice.); *State v. Armstrong*, 2005 WI 119, ¶113, 283 Wis. 2d 639, 700 N.W.2d 98. “[A] new trial may be ordered in either of two ways: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason miscarried.” *State v. Hicks*, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996) (supreme court’s power of reversal); § 752.35 (applying principles to court of appeals).

¶29 James essentially submits that a new trial is warranted in the interest of justice for the same reasons he claims trial counsel was ineffective. He claims that Correa’s allegedly inconsistent testimony identifying him as one of the robbers prevented the real controversy from being tried. He also argues that Correa’s testimony, the absence of Roche’s testimony, and the fact that James allegedly does not have a birthmark all resulted in the miscarriage of justice.

¶30 For all of the reasons we discussed with respect to his ineffective assistance of counsel claim, we disagree with James. This is not an ““exceptional case.”” See *State v. Avery*, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (“The power to grant a new trial in the interest of justice is to be exercised ‘infrequently and judiciously,’” and should be “exercised only in ‘exceptional cases.’”) (citations omitted). As noted, the jury had before it testimony from numerous witnesses that supported the conviction. Consequently, James’s motion was properly denied.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

